PUBLIC CONTRACTS REVIEW BOARD

Case 2091 – CT2007/2021 – Tender for the Provision of a Service for the Non-Emergency Transport for the Ministry for Health including the use of Low Emission Vehicles

2nd April 2025

The Board,

Having noted the letter of objection filed by Dr Matthew Paris acting for and on behalf of South Lease Limited, (hereinafter referred to as the appellant) filed on the 21st July 2023;

Having also noted the letter of reply filed by Dr Alexia Farrugia Zrinzo and Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 31st July 2023;

Having also noted the letter of reply filed by Dr Massimo Vella acting for the Health JV (hereinafter referred to as the Interested Party) filed on the 31st July 2023;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as the DoC) filed on the 31st July 2023;

Having heard and evaluated the testimony of the witness Ms Ruth Spiteri (Secretary of the Evaluation Committee) as summoned by Dr Matthew Paris acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Ms Stephania Dimech (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Ms Charlene Camilleri (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Mr Etienne Mercieca (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Ing Karl Farrugia (Former CEO of the Contracting Authority) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Former Director General of the Department of Contracts) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Mr Joseph Scicluna (Representative of South Lease Limited) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 20th March 2025 hereunder-reproduced;

Minutes

The Tender was published on the 20th January 2021 and the closing date of the call for Tenders was the 23rd February 2021.

The estimated value of the Tender (Exclusive of VAT: €12.807,537.00).

On the 17st July 2023 an Objection was filed by Dr Adrian Delia, Dr Matthew Paris and Dr Roland Aquilina acting for South Lease Limited against the decision of the cancellation of the tender.

A deposit of 50,000 euro was paid.

There were 7 bids.

On the 20th March 2025 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Damien Gatt and Mr Keith Victor Grech as members convened a public hearing to consider the appeal.

The attendance for this appeal was as follow:

Appellant: South Lease Limited

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Mr Joseph Scicluna	Company Representative

Contracting Authority: Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Mr Joseph Piscopo	Chairperson
Ms Ruth Spiteri	Secretary
Ms Stephania Dimech	Evaluator
Ms Charlene Camilleri	Evaluator
Mr Etienne Mercieca	Evaluator

Interested Party – **Health JV**

Dr Massimo Vella	Legal Representative
Leo Grech	Company Representative
Ilona Abela Grech	Company Representative

Witnesses:

Ing Karl Farrugia	Former CEO of CPSU
Mr Anthony Cachia	Former DG of Contracts

Department of Contracts:

Dr Mark Anthony Debono

Mr Kenneth Swain acting as the Chairman welcomed the parties and announced the opening of the session.

Dr Massimo Vella legal representative acting on behalf of Health JV declared that yesterday (19th March 2025) he sent email stating that Health JV withdraws their letter of reply in the appeal case of South Lease (Case No. 2091), subject to the decision regarding the deposit of Case No 2092 being refunded.

Appellants, CPSU Representatives, the Department of Contracts and the PCRB all agreed that Health JV's decisions are minuted and they did not object to the re-imbursement of the deposit paid by Health JV in Case No 2092.

Following this agreement, the Chairman invited the parties to submit their initial submissions.

Appellant's initial submissions

Dr Mathew Paris in his preliminary address pointed out:

- The Court of Appeal has established a number of decisions and guidance to be followed by everyone involved
- The Contracting Authority ignored the Court of Appeal's decision and erroneously re-confirmed the exclusion of the appellant.
- The newly established TEC set up for the second adjudication relied wrongly on parameters which had been already decided by in the first evaluation.
- South Lease Ltd.'s bid is not only valid, *ab initio,* and its exclusion is completely wrong.

Dr Paris referred to a letter received on the 11th July 2023 which was not addressed to South Lease but to another bidder and to the fact that after asking for the reasons of cancellation, this was not given. Dr Paris insisted that adhering to Regulation 40 South Lease did not ask for commercial confidential information and the resulting answer was under "without prejudice" parameters thus restricting the appellant's approach and having no right to the information asked for.

Dr Paris ended his submission by arguing that due to breaches of South Lease's rights the latter is asking for the re-imbursement of the paid deposit and also reserve the appellant's rights in case other issues of which we are not aware of are involved.

CPSU Initial submission:

Dr Leon Camilleri submitted that:

- South Lease who received a letter with the heading of another bidder by mistake received the same letter on their own EPPS.
- Following the Court of Appeal's decision on the 22nd June2022, the two decisions had to be abrogated and this was adhered to.
- The case was re-sent back to a new TEC with new members who took impartial decisions according to the information at their disposal.
- Further argumentation will address the issue of Res Judicata.

Department of Contracts submission:

Dr Mark Anthony Debono for the Department of Contracts (DoC):

Referring to the GRGT Rule 18 Dr Debono reiterated that

- it is clear that there were no compliant offers and

- as regards the Court of Appeals ruling of the 22nd June 2022, there were no decisions stating that the bidder's offer was compliant to the tender documents.

- As regards the issue of Res Judicata again there was no compliancy to the tender documents

- As regards to mistakes regarding the offer the DoC rests on the that once a rectification is done there cannot be another one. He referred to case Nquaymt vs Infrastructure Malta.

Calling of witnesses:

Ms Ruth Spiteri, the TEC secretary was called to the stand.

Questioned by Dr Paris Ms Spiteri under oath, explained who was involved in the TEC, that she was appointed via an email (she does not remember by whom) and there were 4 meetings to evaluating the tender. She stated that the offers were opened at the DC in the absence of the TEC and after receiving them and copies of the PCRB and Court decisions they started the evaluation process. She gave a list of the 6 bidders but a bidder had submitted two offers. All bids were evaluated by TEC members together and there were unanimous accreditations in the form of points throughout.

Ms Spiteri explained that bidders were asked through the ePPS if their bids were still valid considering that the 90 days of the offers' validity had elapsed. All except the one who had two bids confirmed the validity of their bids. Co Op was disqualified due to high financial offer.

At this stage Dr Paris asked to be given the reasons why each bidder including South Lease was deemed non-compliant. She explained that bidders either did not have credit facilities, no garage license, no information on previous contracts, etc.

In the case of South Lease exclusion was due to the indication in the technical offer form that they offered vehicles with 196 emission levels when 175 levels were warranted. No rectification could be asked for.

Witness confirmed that she did not see the letter which was addressed to WAV but confirmed that reasons were intended to South Lease.

Dr Paris asked for an explanation why in that letter there were two reasons for exclusion not just a failure to adhere to technical specifications.

Ms Spiteri emphasized that the 2nd TEC could not understand why the 1st TEC had asked for a clarification when this couldn't be done since it was of a technical nature.

Cross examination by CPSU

Answering questions by Dr Leon Camilleri Ms Spiteri affirmed that all correspondence is done through the ePPS system that they do not receive letters from the DoC and no other ulterior documents.

Answering further questions by Dr Debono (DoC) she explained that reasons for cancellation according to the letter dated 11 July 2023, related to firstly, the technical offer form which stated emissions levels higher than the stipulated threshold, which the second evaluation committee recommended, and secondly, related to the clarifications that were sent. She also explained that two evaluation reports were sent. In the first one which was sent in the 31st August, the only reason for rejection was that of the technical offer form. She explained that the second evaluation report was sent in response to what was requested by the General Contracts Committee (GCC).

She explained that at this point the evaluation committee looked at the clarifications requests sent by the previous evaluation board, noting the bidder's response included an amended technical offer form whereby the appellant crossed off the 196g reported originally and included 176 instead, which was still over what was expected, and clearer literature. The literature showed that the vans had emissions of 176. She confirmed that the reasons included in this second report matches the reasons mentioned in the letter.

Stephanie Dimech ID 61279 was called as witness by Dr Adrian Delia and answer questions she admitted that she is not a technical person, does not know if TEC members were technical persons and that the TEC did not ask for advice from technical personnel. The evaluating committee rested on the documents provided and remembered, and was also shown by Dr Delia that the vehicles were of three (3) different types.

Answering further questions she doesn't know and doesn't remember if the requirements for the vehicles where the same or different for each type nor if the emission criteria where for one or all vehicles.

At this point Dr Delia referred to the Tender Document on page 23 section 3.4 Article 3 - point 2, pt. 4, pt. 29 (re Tail Lift Vans) witness agreed that **the average** of emissions of vehicles was to be that of 175 and when compared to the letter dated 11th July 2023 the letter of exclusion or cancellation specifically refers to one type of vehicle that is Tail Lift Vans only.

Quoting from specification found in Letter K witness confirmed that emission where to be calculated on a Fleet average for vans not exceeding. When asked if there was a possibility that one of the vans could have more emissions than 175 witness answered in the affirmative.

When asked how could the TEC establish whether or not the submitted fleet has that average the witness said that they relied on the submitted literature.

To the question of how was the board able to verify according to the principle found in letter K of the Tender Document and that the fleet has an average of 175 emissions the witness answered that they based their judgment on the literature provided.

To the question of who had to indicate the figures of emissions witness answered the bidder.

Witness also said that she does not remember seeing a document in the Tender Document presented by South Lease dated 20th February 2021 and which was tabled by Dr Delia. This document ascertains that the bidder indicated the figures of emissions. She also ascertained that they decided on an offer which had 196 corrected to 176 emissions.

At this stage Dr Delia asked why the TEC not acknowledge the mentioned document which was part of the Tender document since they did not ask for any clarifications.

Cross examination by CPSU of Stephanie Dimech by Dr Leon Camilleri

Replying to Dr Camilleri's questions witness confirmed that;

- That the Tender Document asked for Tailed Lift Vans of 175 grams/kilometre emissions
- That South Lease indicated 196 gms/kilometre in the technical offer form in the original submissions.
- That after a clarification bidder struck off the numbers 196 and on the same formula wrote 176 gms/kilometre

- That in the original submission the technical offer form is under Note 3 and cannot be rectified.

Dr Delia called Charlene Camilleri Vella (ID number 535475m) member of the 2nd evaluation board to take the witness stand.

Answering question by Dr Delia witness confirmed that:

- She is not a technical person but a banker
- None of the TEC members had technical knowledge
- There were 3 different types of vehicles involved in the Tender
- Exclusion was only based on the technical offer form and relating to tail lift vans (dated 11th July)
- The bidder had to declare the average figure of emissions i.e. 175 of the fleet according to page 29 letter K of tender document.
- Did confirm that this document dated 20th February 2021 which was part of the Tender Document and presented by South Lease ltd.

At this stage Dr Delia asked why did the board not ask for a clarification since you declared that there were some discrepancies and a rectification was not asked for since the tender was under Note 3 regulations? Witness declared that the board did not ask for a rectification neither for a clarification.

Witness also confirmed that there was a need of verification that vehicles had to be certified by an authorized entity to be Euro 6 but there was not a need for a certification by an authorized authority for the emissions hence the bidder's declaration was enough.

Cross examination of witness by the CPSU

Dr Leon Camilleri asked Ms Charlene Camilleri Vella the same questions he had asked Stephanie Dimech. Her answers were the same the same as Ms Dimech.

Dr Adrian Delia called Mr Etienne Mercieca evaluator (ID 342574) to take the witness stand

Answering questions of Dr Delia Mr Mercieca said that they concentrated on the emissions and the numbers quoted by South Lease. They had to draw a line even if this was one emission more. He confirmed that he saw the Court's decision especially page 8 indicated by Dr Delia which says that the bidder must not be penalized due to an unclear requisite.

Cross examination by Dr Camilleri

Mr Mercieca repeated the same answers to the same questions asked to the previous evaluators and added that he doesn't remember that the document of the 20th February was submitted after a clarification was answered and not with the initial submission of South Lease. He also agreed that the literature requested strengthens a bid in the technical offer form.

Dr Adrian Delia called Ing Karl Farrugia (ID No 24774M), former CEO of CPSU, to the witness stand.

He described the tendering process of the first issue leading to Healthcare JV winning the tender while South Lease were excluded due to emissions not meeting the technical specifications. This was followed by an appeal, a confirmation by the PCRB of the decision and the eventual sentence by the Court of Appeal which asked for a revaluation of the tender. The call involved an average of emissions for vehicles in all different categories. He explained that technical specifications are not done by the CPSU but by technical people in the Health Department.

Mr Farrugia was shown South Lease 's document of the 20th February 2021 and Page 29 with subsections of the Tender Document showing that the fleet average of emissions for Tail Lift Vans was to be 175 and Certified Euro 6 and where in the later the bidder must list the specifications demonstrating that he complies. Ing Farrugia confirmed that according to the documents presented to me indicate that the declaration of South Lease is exactly what we asked in the Tender Document.

Cross examined by Dr Leon Camilleri, Ing. Farrugia by CPSU Ing Farrugia declared that he was not aware of any details following the Court's decision as he was no longer involved in the case.

Mr Anthony Cachia (ID 142658 M) was called to the witness stand.

He explained in detail the involvement of the GCC throughout the whole process leading to the GCC decision to agree that the tender is to be cancelled. His explanation in detail was presented in writing and copies of this were given to all parties involved

He ended by stating that, according to the GCC, the TEC did not follow the Court's decision.

Cross examined by the CPSU Mr Cachia explained how the GCC is composed and no member of the GCC made any technical evaluation. He also affirmed that the GCC discussed the issue of the clause referring to the 175 emission requirement.

Answering questions from Dr Debono, Mr Cachia confirmed that bidders cannot ask for clarifications and that technical specifications cannot be changed once a tender time allowed by article 262 of the PPR has expired.

Mr Joseph Scicluna (ID 48773M) was called to the witness stand.

Answering questions by Dr Debono Mr Scicluna testified that he did not remember whether the rejection letter was received through email or as an official letter. The secretary of the office usually receives the letters.

Final Submissions:

Dr Delia for appellant

- We can discern letter of objection which was not addressed to us and which is not clear whether it is a cancellation or rejection.
- We have to side step the 1st evaluation board with its decisions
- We must examine the technical specifications as requested
- The fact that the TEC was not conscious and did not adhere to the Court's decisions
- No one can ignore Court Sentences
- We were not rejected on any items regarding Euro 6, vehicles, certifications approval by authorized entities, etc.
- As regards the emission requirement in 3.4.2.10 the tender requested something. This requirement's verification had to be given by the bidder himself. This was confirmed by all the members of the evaluation committee. Even Ing Farrugia, the client, confirmed that the declaration was exactly what was needed.

Dr Delia explained that it is an abnormal situation where a much needed tender had to see a problematic evaluation process which took 2-4 years in the process, related to an important national institution, when the offer is compliant with the tender as the client himself under oath agreed. The 2nd evaluation board had doubts and where there is doubt law requires the committee to send a clarification request.

Dr Delia ended his submission by stating that the evaluation deals with trivial things while ignoring serious and mandatory sentences both on an national and international level.

Dr Leon Camilleri for CPSU

The CPSU contends that the evaluation process has been correctly followed as per law. Dr Camilleri explained that law requires the evaluation committee to exercise the principle of self-limitation.

Dr Camilleri stated that the tender had clear parameters and established terms. In his statement he included the testimony of former Director General (Contract) who confirmed that the requirement was an average emission of 175 g/km for the fleet of tail-lift vans.

Dr Camilleri explained that the major issue in this case is that the literature corroborates the technical offer form and not the other way round. If in the technical offer form the bidder stated that the average fleet emissions are 196 when the requisite was 175, then the evaluation committee could not send a clarification because a clarification does not change what was submitted. That would have amounted to a rectification which is not allowed under note 3 which safeguards the principle of self-limitation and that of equal treatment. Over and above in a clarification that was sent the 196 emissions level declared were changed to 176, being still over the limit of 175.

In his reply to the appellant argument that the evaluation committee did not follow the court decision, Dr Camilleri stated that the court cannot substitute the evaluation committee, and that the court didn't compute the average itself. In fact the court sent the case for re-evaluation by a newly constituted evaluation committee. The court only stated that the 175g/km is an average for the fleet of tail-lift vans which the contracting authority agrees with.

CPSU also refers to article 90 sub-article 3 where the PCRB can order the cancellation of the tender itself.

In respect of the doubt purported by the appellant relating to whether the letter referred to a letter of rejection or a letter of cancellation, Dr Camilleri stated that CPSU contends that the TEC communication was both a letter of rejection and a letter of cancellation and that the evaluation decision should be confirmed.

Dr Debono for DoC

Dr Debono referring to Steelshape Ltd vs Director of Contracts. Case appeal ref 175/2013/1 decided on 7/8/2013, stated that the Court of Appeal can never declare that the bidder's offer is in conformity with the specifications of the tender. With respect to the average fleet specifications the TEC was clear in declaring that the indicated amount in the technical offer form was not conforming to those requested in the Tender Document. Dr Debono also explained that it is not opportune at this stage discussing the meaning of the words "average fleet", when no pre-contractual remedies were availed of.

Dr Debono stated that an opportunity was given for a clarification, which did not solve the matter.

DR Debono also quoted Case Nexans France vs Joint Undertaking Fusion for Energy, Case T415/2010 decided on 20/3/2013 and stated that a TEC cannot depart itself from rules that it established. The 175 requirement is a requirement which the TEC itself demanded and that 176, even if by a minimal amount as said in one of the testimonies is still above the TEC requirement.

Dr Paris for appellant:

Dr Paris, whilst also referring to case JV HealthCare Ltd vs Department, 12th June 2023, explained that the technical offer form is not the only document that counts, in case of contradictory documentation/literature, as the Contracting Authority contends. He stated that if one would look at the technical offer form itself, one notice that such form is conditional to the terms of reference and that the PPR regulations does not make any distinction as to what document should be given priority, actually all documents should be treated in an equal manner.

As regards the reference to clarification, Dr Paris contended that the Contracting Authority actually sustains one of the appellant's grievance, being that the second evaluation committee was conditioned by the ruling of the first Evaluation Committee.

Dr Paris referred to Case No 72/22/1 South Lease vs CPSU, dated 22/6/2022 where the court held that the bidder cannot be penalized on an unclear clause.

What the Client needed, the appellant provided and our exclusion was wrong because:

- There was a wrong evaluation
- An evaluation conditioned by the rulings of another evaluation
- An evaluation which did not heed the court's ruling, and was only taken into account in the revaluation of the evaluation of the second evaluation committee.

Dr Paris ended his submission by stating that someone has to explain to the PCRB why it should reach the decision for the cancellation of the Tender.

Dr Leon Camilleri for CPSU

Dr Camilleri made reference to the appellant argument that the technical offer form is conditional to the terms of reference. He explained that nowhere in the document states that the offer should be conditional to other documents than the terms of reference or the technical offer form.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 20th March 2025.

Having noted the objection filed by South Lease Limited (hereinafter referred to as the Appellant) on 21st July 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT 2007/2021 listed as case No. 2091 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Delia, Dr Ronald Aquilina & Dr Matthew Paris

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Interested Party: Dr Massimo Vella

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) **Preliminary -**

Reference is hereby being made to a request made to the Doc, wherein information about the cancellation and the rejection of the all bids has been requested. In view of the fact that partial information has been supplied by DoC, Appellant is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the Public Contracts Review Board to safeguard its interests and ensure that the legal principle of *audi alteram partem* is upheld. Thereby, the PCRB is being requested to render an interlocutory decree ordering DOC to furnish all the relative and relevant information. Finally and in addition to the above stated, whilst Appellant is confident on its appeal in merit, it is hereby respectfully requesting the PCRB to refund the deposit in its entirety, and this in view of the fact that DOC has failed to provide the necessary and relevant information [as requested], thus the appellant did not have all the necessary information to take an informed decision prior to submitting its objection, In substantiation of this position, reference is hereby being made to Court of Appeal decision Firetech Cross TLS Joint Venture vs Dipartiment tal-Kuntratti dated 30th October 2015, which dealt with a similar situation, and which confirmed that unless the necessary Information is available, the deposit paid should be refunded in its entirety.

b) **Court of appeal decision is *res judicata* -**

The Court of appeal judgment in the names of South Lease Limited vs Dipartiment tal-Kuntratti et., dated 22nd June 2022, is res judicata, and thereby the contents therein are to be scrupulously observed, without any deviation whatsoever. The matter relating to emissions has been discussed and determined by the Honourable Court of Appeal, in particular when it held that, *"Materja ohra li holqot problema hu r-rekwizit li, fir-rigward tal emissjonijiet, fis-sejha kien hemm klawsola li tghid hekk: "the fleet average for vans should not exceed 175 Co2 /km". Is-socjeta appellanti offriet vannijiet li whud kellhom emissjonijiet taht dak stabbilit u ohrajn aktar minn hekk. Il-Bord donnu stenna li kull vann inkluz fl-offerta kellu jkollu emissjonifiet taht il-175 Co 2/ km, izda s-socjeta appellanti - bir-ragun tara din il-Qorti - targumenta li l-klawsola ma tesigix li kull vettura proposta minn oblatur kellu jkollha 175 Co 2/km rating, izda li l-average tal-vetturi kollha f'daqqa proposti minn oblatur ikunu inqas minn dak stabbilit. Jista' jkun li l-hsieb tat-awtorita kontraenti kien li kull vettura kellu jkollha dak ir-rating, pero jekk hu hekk dan il-hsieb ma giex espress fid-dokument tas-sejha, u oblatur ma ghandux jigi penalizzat fug is-sahha ta' klawsola li mhix cara fit-tifsira taghha."* Without prejudice to all other grievances raised, Thereby the evaluation committee/the contracting authority

cannot launder the same reasons for rejection and in the process disregard the statements made and done by the Honourable Court of Appeal.

c) **Reason for rejection is 'superfluous' -**

In its reasons for rejection, the DOC held inter alia that, *"In the technical offer form section 3,2.3 the bidder stated that the Average Emissions of the Tail-lift Vans are 196 g/km, while he stated that the Average Emissions of the Tail-Lift Vans are 176 g/km when resubmitting the technical offer form following a clarification request for the submission of Literature."* The aforesaid has been declared by DOC in view of the reply submitted by the appellant within the technical offer form (hereinafter 'TOF'). Notwithstanding that the TOF is of a Note 3 status, in a recent Court of Appeal judgement in the names of JV HealthCare Limited versus Dipartiment tal-Kuntratti et (12th June 2023), Court confirmed that wheresoever a statement is superfluous and unnecessary, it should not be considered by the contracting authority, and in particular it should not be used to reject an offer. It has been made amply clear by the Tender document itself that, verification of compliance with the tender requirements had to be done through the submission of the appropriate, including where necessary though the submission of documentation in conformity with the criteria requirements, and not through the TOF, thus in the case under review the statement within the TOF was superfluous. This has been specifically confirmed through "3.4.2.10 – TECHNICAL SPECIFICATIONS FOR TAIL-LIFT VANS:", wherein it is held that: *"Verification: Bldder must list the technical specifications for Tail Lift vans demonstrating that he complies with the criteria established under this heading"*. Whilst confirming that the appellant has submitted a list confirming that it complied with the criteria established [and this through a self-declaration], in accordance with the tender document verification, it provided the necessary additional confirmation through an independent certificate by Ing. Alosio confirming the veracity of the statement provided by the appellant.

d) **Obvious material error -**

Without prejudice to the aforesaid, and whilst reiterating that any verification should have been done in accordance with the tender requirement [and no other], the 196 g/km included within the TOT was a clear and obvious material error, which should have not led to the exclusion of the appellant. Whilst article 39 of the Public Procurement Regulations (hereinafter "PPR") emphasis the principles of equal treatment and level playing-field, it has been confirmed on many occasions that the correction of obvious errors should not lead to the rejection of the offer, in particular when these do not alter the contents of the bid. In the context under review, the self-declaration signed by the company director, as well as all the additional documentation submitted both in the first instance, as well as in the second instance, confirm that there has not been any changes to the original bid, and thereby the rejection of the appellant's bid is not only disproportionate, but also excessive in the circumstances.

e) **Re-evaluation based on evaluation -**

In clear and unequivocal terms, the Court of Appeal held that, *"Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' South Lease Ltd, billi tilqa' listess, thassar u tirrevoka s-sentenza li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici tal-31 ta' Jannar, 2022, kif ukoll id decizjoni relattiva li tkun hadet l-awtorita kuntrattwali (is-CPSU), u tibghat il-kaz ghal quddiem l-istess awtorita sabiex, tramite persuni li ma kienu bl-ebda mod involuti fi-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak it jinghad f'din is-sentenza."* Notwithstanding the aforesaid and without prejudice to the other grievances on the merit, the Second EC failed to adhere to the orders of the Court of Appeal, and based its re-evaluation on the workings and outcomes determined by the First EC. This is *inter alia* confirmed through the letter of rejection, wherein the Second EC held that, *"The bidder did not submit proof that ECL Consulting Engineers is an authorized authority and further clarifications could not be requested as the: a. Previous board had already asked for literature to be submitted;"* In accordance with the decision of the Court, the evaluation committee, as newly re-constituted, had to re-evaluate the bids afresh and not rely in any manner on what was previously determined by the First EC. The evaluation by the Second EC has been influenced by the findings and the determinations of the First EC, thus and in subordination of the grievances presented above, the PCRB is hereby being called upon to order and instruct the DOC to re-evaluate all bids in accordance with the decision of the Court of Appeal, whilst discarding all workings, findings and determinations of previous evaluation committees. Thus, and without prejudice to all other grievances, *de minimis* the cancellation is unfounded and should be revoked.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 31st July 2023 and its verbal submission during the hearing held on 20th March 2025, in that:

a) **On the First Grievance: Preliminary -**

CPSU submits that detailed reasons for the rejection of the Objector's offer were given in the letter of rejection dated 11" July 2023, just like each and every other bidder which received the reasons of rejection pertaining to the individual bidders. The Objector, in addition with the reasons for rejection of its offer was also informed that the tender process was being cancelled since there was no qualitatively or financially worthwhile tender. Whilst it is understandable that the Objector files an objection letter contesting the reasons for its exclusion, there is no juridical interest in the reasons of rejection of the other bidders, and one would not imagine that the Objector intended to file an objection contesting the exclusion of its competitors. Such objection (contesting the exclusion of other tenderers) is not even possible since regulation 270 of the PPR states that an objection may be filed by any person *"having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken",* and the Objector does not have any legitimate interest in the reintegration of other competitor tenderers. It is therefore being submitted that this

grievance is frivolous, and is only being made in order to claim back the deposit in the eventuality of a decision against the Objector.

b) **On the Second Grievance: Court of Appeal Decision is Res Judicata. -**

The Court of Appeal in paragraph 11 of its judgment of the 22l of June 2022 states that: *"din il-Qorti mhix sejra tissuplixxi d-diskrezzjoni taghha dwar l-ghazla flok il-kumitat evalwattiv, sejra tibghat il-kaz lura lill-kumitat evalwattiv biex dan, b'nies godda fuq il-kumitat, jerga jevalwa fug l-offerti sottomessi."* The court goes on to say in its final dispositions *"u tibghat il-kaz ghal queldiem l-istess awtorita sabiex, tramite persuni li ma kienu bi-ebda mod involuti fil-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak li jinghad fdin is-sentenza."* The above effectively means that the Honourable Court of Appeal still decided that the final decision should be of an impartial evaluation committee who should evaluate the submitted offers. This effectively means that the newly appointed evaluation committee did have a certain degree of discretion as it would be a superfluous to tell a newly appointed evaluation committee "evaluate independently and impartially but decide in this way". Moreover in a similar situation, Case 1843 - CT 2095/2022, where the plea of Res Judicata was being raised, the contracting authority a gued that a new evaluation merited a new review and rejected the plea of Res Judicata.

c) **On the Third Grievance: Reason for Rejection is Superfluous -**

In this grievance the Objector is claiming that its own declaration in the Technical Offer Form (TOF) is superfluous and is citing the Judgment of JV Healthcare Limited vs Dipartiment tal-Kuntratti et, decided by the Court of Appeal on the 12th June 2023. CPSU submits that the above cited judgment relates to the registration of medicinal products and thus the context and circumstances are totally different than the tender merit of this objection. The quoted paragraph from the JV Healthcare judgment is therefore not applicable for the present case. In paragraph 3.3 of the Objection letters, the Objector states that the verification of compliance is not made through the TOF but with other submissions including documentation where necessary. The Objector however fails to state where this is stipulated in the tender document. CPSU respectfully submit that the tender document does not state what the Objector is purporting but it actually states the opposite, in Page 7, Instructions to Tenderers Clause 5 where it states: *"Tenderer's Technical Offer Form (Technical Questionnaire) (Note 3). Kindly note that all technical criteria listed in the Technical Offer are of a mandatory nature and must be filled in. Failure to submit the filled in form will disqualify the submitted offer. Bidders are to include in their offer all the information requested in the technical offer form and other forms included in this call including but not limited to the literature list."* The General Rules Governing tenders are clear in clause 16.3 whereby it is states that: *"No rectification shall be allowed in respect of the documentation as accompanied by Note 3 in Clause 5 of the Instructions to Tenderers. Only clarifications on the submitted information in respect of the latter may be requested. No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications."* It is crystal clear in the tender document that the emission level of the tail lift van feet must not exceed the 175g CO2/KM, in fact the same technical offer form requested the below: *"State the emission standards of the Tail lift Vans. These emissions*

must meet the requirements established in this call and the fleet average emission must not exceed 175g C02/km." Additional documentation should have been presented by the bidder to substantiate and not replace the technical offer form. It was evident for the evaluation committee that 196 (and even 176 although the technical offer form is non rectifiable) was not in conformity with what was required in the tender, that is, 1.75 and hence came to its conclusions. Moreover, CPSU submits that the document submitted by Ing. Aloisio could not change what is stated in the technical offer form.

d) **On the Fourth Grievance: Obvious Material Error -**

The objector submits that the 196g CO2/KM, written down in the first submission was an obvious material error which should not have led to the exclusion of the Objector's offer. CPSU submits that if this was a material error the first time, it was also an error the second time when the Objector listed 176g CO2/KM, as it was still more than 175g CO2/KM, despite the fact that the Technical offer form was non rectifiable and the first submitted number should hold. Moreover unlike what the Objector is stating, it is not the case that there were no changes to the original bid, as the 165g C02/KM, featured only following the clarification request, when the Objector was asked to submit clearer documents than those initially submitted, and could not change the original technical offer form.

e) **On the Fifth Grievance: Re-evaluation based on Evaluation -**

CPSU respectfully submit that it did comply with the decision of the Court of Appeal and referred the bids to a newly composed evaluation committee to evaluate the bids with the normal evaluation procedure, comparing the submission to the tender document but also taking into consideration the conclusions of the Court of Appeal. The Objector is contradicting itself in this third grievance as it is implying that the second evaluation committee should not have taken consideration of the documents submitted by the Objector following the clarification request whilst on the same letter of Objection in paragraphs 3.5 and 4.4 is referring to the information submitted following the clarification request. The evaluation committee evaluated the documents submitted and conducted the evaluation process in the utmost independent and Impartial possible, in line with the fundamental principles of public procurement and came to its independent conclusions, on strong grounds emanating from the specifications as published as will be better explained in the evaluation committee's testimony during the hearing. The ultimate proof that the evaluation committee was not influenced with the decision of the first evaluation committee is that the second evaluation committee did not make the same recommendation as the first evaluation committee and recommended that the tender is cancelled and not awarded to Health JV which was recommended for award in the first evaluation process.

This Board also noted the Department of Contract's Reasoned Letter of Reply filed on 31st July 2023 and its verbal submission during the hearing held on 20th March 2025, in that:

a) **Preliminary -**

The DoC objects to the submission of the appellant that partial information had been submitted to the appellant and submits that it has complied with the requirements stipulated in regulation 242 and regulation 272 of the Public Procurement Regulations, 2016. The letter addressed to the appellant contains all information why the call for tenders is being cancelled and contains a summary of the relevant reasons for the rejection of the tender. In accordance with Regulation 242(3) of the Public Procurement Regulations, 2016, Contracting Authorities are entitled to *'withhold certain information regarding the Contract award...where the release of such information...would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators'*

b) **Court of Appeal res judicata -**

Whilst, in accordance with article 227 of the Maltese Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, the content of the judgment of the Court of Appeal is not subject to appeal, the order of the Court of Appeal specified that: *"tibghat il-kaz ghal quddiem l-istess awtorita' sabiex, tramite persuni li ma kienu bl-ebda mod involuti fil-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak li jinghad f'din is-sentenza"*. The Court of Appeal did not order to the tender evaluation committee to declare that the tender offer is in conformity with the procurement documents.

c) **Reason for rejection -**

In accordance with Steelshape vs Id-Direttur tal-Kuntratti et, it had been held that *"Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers... il-principju jibqa' li, bhala qorti ta' revizjoni, il-kompetenza ta' din il-Qorti hija necessarjament cirkoskritta."* Evidence that the tender offer is compliant with the tender document specifications is provided in terms of regulation 55 of the Public Procurement Regulations, 2016 that provides that economic operators are to provide test reports from conformity assessment bodies as proof of conformity. While the appellant should provide the documentation stated in its reasoned letter of objection, was bound to prove that the supply in compliance with the standard, meets the performance and functional requirements of the contracting authority.

d) **Obvious material error -**

The DoC disagrees with the submission of the appellant and the reference to the judgment delivered by the European Court of Justice since the judgment referred to has provided on Directive 2004/18 that is not the applicable legislation and has now been superseded by Directive 2014/24/EU. In any instance, regulation 62(2) of the Public Procurement Regulations, 2016 provides that all requests must be in compliance with the principles of equal treatment.' The DoC refers to the judgment Nquaymt vs Infrastructure Malta? where it had been held that: *"Jekk oblatur*

ikun inghata opportunita ta' rettifika imma xorta wahda jibga' administratively non-compliant, il-bord ta' evalwazzjoni ma jistax isalva dik I-offerta billi jogghod jigri wara dak I-oblatur sakemm dan, forsi, jirregola l-pozizzioni tieghu." The same principle had been enunciated in C&F Building Contractors Limited vs Direttur Generali tal-Kuntratti *"Effettivament dak li trid l-appellanti hu illi taghmel tibdil fis-sustanza tal-offerta wara li z-zmien ghall-offerti inghalaq. Dan imur kontra l-kondizzjonijiet tas-sejha li jghidu illi "no rectification shall be allowed"*. Therefore, the DoC respectfully submits that there has been no excessiveness in the manner that the Tender Evaluation Committee has provided for its decision.

e) **Revaluation based on evaluation -**

The DoC respectfully disagrees with the statements of the appellant that the tender evaluation committee has not adhered to the orders of the Court of Appeal, since the judgment has not declared that the tender offer had been and is compliant with Section 3.2.3 of the tender document. In terms of rule 16 of the General Rules Governing Tenders, Evaluation Committee check the compliance of tender submissions in accordance with the instructions given in the procurement documents. The principle of self limitation has been enunciated in Nexans France vs European Joint Undertaking for ITER and the Development of Fusion Energy (T-415/10) referred to by the Court of Appeal in Cassar Fuel Limited vs Gozo Channel (Operations) Limited. *"It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications."* In accordance with regulation 38 and regulations 53 of the Public Procurement Regulations, 2016, the procurement document, including the technical specifications had been written in clear and unambiguous terms. The conclusions of the tender evaluation committee are in conformity with the principle of adherence to the prescribed procedure.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

a) **Preliminary**

The appellant argument is twofold. First, the appellant argues that the rejection letter was erroneously addressed to another bidder, WAV JV (TID 149418), instead of South Lease Limited (TID 149385). The appellant asserts that this constitutes a breach of the provisions of the Public Procurement Regulations ("PPR"), which impose an obligation on the Contracting Authority to inform all participants of the rejection or award of their tender.

The Contracting Authority, in its initial submissions did not contest that the letter of rejection had, in fact, been directed to WAV JV. However, it maintained that all reasons for rejection were, in fact, related to the appellant and that the appellant had received the letter through the Electronic Public Procurement System (EPPS).

The facts presented before the Board clearly indicate that the rejection letter was addressed to "WAV JV TID 149418", which constitute an administrative error by the Contracting Authority. The Board acknowledges that such errors should not occur, particularly given that the rejection letter undergo a vetting and approval process overseen by the DOC before issuance. However, in this instance, the Board does not find that the error amounts to a breach of the PPR. The Board notes that the correct bidder received the rejection notification, through its official EPPs account, along with the reasons for its rejection, notwithstanding the incorrect name at the top of the letter. Therefore, the Board does not uphold this first preliminary argument.

In the second instance, the appellant contends that the rejection letter issued by the Contracting Authority failed to adequately communicate the reason for the cancellation of the tender in accordance with article 272 of the PPR. Specifically, the rejection letter stated the following:

> *"However, I regret to inform you that this tendering procedure is being cancelled in line with Article 18.3(a) of the General Rules Governing Tendering where it is stated that:*
>
> > *"Cancellation may occur where the tender procedure has been unsuccessful, namely where no qualitative or financial worthwhile tender has been received or there has been no response at all"*

On the other hand, the Department of Contracts (DOC) asserts that the reasons for cancellation were indeed disclosed in the rejection letter dated 11 July 2023. Furthermore, in its reasoned letter of reply, the DOC argues that the cancellation was also in accordance with article 242(3) of the PPR, which allows the Contracting Authority to:

> *"Withhold certain information regarding the Contract Award…where the release of such information.. would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators."*

Additionally, the CPSU, in its reasoned letter of reply, stated that the appellant had been informed that the tender was being cancelled since there was no qualitative or financially worthwhile tender. CPSU further argues that the appellant has no juridical interest in the reasons of rejection of the other bidders.

The Board notes that the dispute primarily concerns Article 272 of the PPR, which provides that:

"The communication to each tenderer or candidate concerned of the proposed award or of the cancellation of the call for tenders shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 242 or ***the reasons why the call for tenders is being cancelled*** *[board emphasis] after the lapse of the publication period, and by a precise statement of the exact standstill period."*

Upon review, the Board finds that while the Contracting Authority, did in fact, notify the appellant of the cancellation of the tender, it failed to provide a specific and substantive explanation as to **why this particular tender was cancelled** [Board emphasis]. Instead, the Contracting Authority made reference to the General Rules Governing Tendering and article 18.3(a), which outlines various scenarios where a tender **may** [Board emphasis] be cancelled:

"Cancellation ***may*** *[board emphasis] occur where the tender procedure has been unsuccessful, namely where no qualitative or financial worthwhile tender has been received or there has been no response at all"*

The use of the word "may" in Article 18.3(a) suggests that the list of grounds for cancellation is non-exhaustive and that additional legal justifications for cancellation may exist. The Board is of the opinion that while such general references provide guidance, they do not fulfil the explicit requirement under Article 272 of the PPR, which mandates a clear and specific justifications for cancellation.

Furthermore, although the Board understands the DOC argument relating to confidentiality under Article 242(3), it is evident that the appellant was not seeking the exact reasons for the rejection of each of the other bidders. Has this been the case, the Board acknowledges that such disclosure could have revealed confidential elements. However, in this particular context, the Board believes that a simple statement along the lines of, for example, *"However, I regret to inform you that this tendering procedure is being cancelled because there was no technically compliant offers"* would have sufficed.

Given the foregoing considerations, the Board determines that the Contracting Authority **did not** sufficiently justify the cancellation of the tendering accordance with Article 272 of the PPR. While the cited provisions allow for cancellation under certain circumstances, they do not exempt the Contracting Authority from its obligation to communicate a clear and substantive reason for the decision. The Board, therefore, upholds this second preliminary argument in that one cannot really understand why the tender has been cancelled.

b) **Court of appeal decision as *res judicata***

The appellant contends that the issue concerning emissions has already been discussed and determined by the Honourable Court of Appeal in its decision of the 22 June 2022 in the names of **South Lease Limited v. CPSU et.** On this basis, the appellant contends that the Contracting Authority cannot rely on the same grounds for rejection, thereby disregarding the findings and determinations made by the Honourable Court of Appeal.

In contrast, the DOC and the CPSU reiterate that in its decision the Honourable Court of Appeal, did not order to the evaluation committee to declare that the appellant's offer is in conformity with the procurement documents. Reference is made to the above mentioned decision of the 22 June 2022:

> *"Kif wiehed jista jara mill-premess, l-ghazla li ghamlet l-awtorita kontraenti u sussegwentement ikkonfermata mill-Bord, hija monka u trid tigi mhassra. Iz-zewg decisjonijiet iridu jigu mhassra u peress li din il-Qorti mhix sejra tissuplixxi d-diskrezjoni taghha dwar l-ghazla flok il-kumitat evalwattiv, sejra tibghat il kaz lura lill-Kumitat evalwattiv biex dan, b'nies godda fuq il-kumitat, jerga' jevalwa fuq l-offerti sottomessi."*

Upon review of the decision of the Honourable Court of Appeal, the Board noted the following:

> *"Materja ohra li-holqot problema hu r-rekwizit li, fir-rigward tal-emissjonijiet, fis sejha kien hemm klawsola li tghid hekk: "the fleet average for vans should not exceed 175 CO_2/Km". Is-socjeta appellant offriet vannijiet li whud kellhom emissjonijiet that dak stability u ohrajn aktar minn hekk. Il- Bord donnu stenna li kull vann inkluz fl-offerta kellu jkollu emissjonijiet that il-175 CO_2/Km, izda is-socjeta appellant – bir-ragun tara din il-Qorti – targumenta li l-klawsola ma tesigix li kull vettura proposta minn oblatur kellu jkollha 175 CO_2/Km rating, izda li l-average tal -vetturi kollha f'daqqa proposti minn oblatur ikunu inqas minn dak stabbilit. Jista jkun li l-hsieb tal-awtorita kontraenti kien li kull vettura jkollha dak ir-rating pero jekk hu hekk dan il-hsieb ma giex espress fid-dokument tas-sejha, u oblatur ma ghandux jigi penalizzat fuq is-sahha ta klawsola li mhix cara fit-tifsira taghha."*

It was made clear during the hearing that the Contracting Authority adopted the Court's reasoning that the vehicle emissions were to be assessed on a **fleet average** [Board Emphasis] basis. This interpretation permits individual vans within the fleet to exceed the threshold of 175g CO_2/Km provided that the overall average emissions for the fleet do not exceed 175g CO_2/Km.

When testifying under oath, the secretary of the evaluation committee, confirmed that the sole reason for rejection was the indication in the appellant's technical offer that the **average** [Board Emphasis] emissions of the proposed fleet amounted to 196g CO_2/Km. Furthermore, the rejection letter

explicitly refer to **average** [Board Emphasis] emissions as the metric utilised in the evaluation process, thereby confirming this as the basis upon which the appellant's offer was assessed.

Having reviewed all submitted documents and considered the oral representations made during the hearing, the Board finds that the reason for rejection does not stem from the dispute over whether emissions should be assessed on a "per van" or "average" basis. Rather, the evaluation committee rejected the appellant's offer based on the **average** emissions. Accordingly, the Board finds no merit in the appellant's contention in that the evaluation committee went against the Honourable Court of Appeal's decision.

c) **Reason for rejection & Obvious material error**

The appellant argues that the reason of rejection is "superfluous". In support of this position, the appellant refers to the decision of the Court of Appeal dated 12th June 2023 in the case of **JV Healthcare Limited v. Dipartiment tal-Kuntratti et**. In its decision the court held that when a statement is deemed superfluous and unnecessary, it should not be considered by the contracting authority, and consequently it should not be used to reject an offer.

The appellant maintains that although the technical offer form (section 3.2.3) indicated a fleet average emissions level of 196g CO_2/Km, the appellant submissions also included a self-declaration (as required by the tender dossier, page 29) confirming compliance with the established criteria:

> *"Verification: Bidder must list the technical specifications for tail Lift Vans demonstrating that he complies with the criteria established under this heading"*

Based on this, the appellant argues that the value indicated in the technical offer form constitutes an evident and correctable error.

Under oath, witnesses from evaluation committee testified that the technical offer form submitted by the appellant originally stated an average emission of 196g CO_2/Km. This figure was subsequently restated to 176g CO_2/Km following a clarification, requesting submission of literature which was illegible. Nonetheless, since the revised figure of 176g CO_2/Km still exceeded the threshold established in the tender. The evaluation committee therefore deemed the technical offer form as non-compliant and non-rectifiable since the technical offer form submissions are tagged as note 3, requiring the evaluation committee to send only clarifications.

These testimonies are supported in Contracting Authority's reasoned letter of reply, which relied on clause 16.3 of the General Rules Governing Tenders, stating that:

"No rectification shall be allowed in respect of documentation as accompanied by note 3 in clause 5 of the Instructions to Tenderers. Only Clarification on the submitted information in respect of the latter may be requested. ***No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested.****"*

The Board understands that the second evaluation committee was presented with three documents, being:

1. A **technical offer form** indicating average emissions of **196g CO_2/Km**, which did not comply with the required threshold,
2. A **self-declaration** confirming compliance and specifying **175g CO_2/Km**, which fulfilled the tender requirements, and
3. An **amended technical offer form/new literature** submitted in response to a clarification regarding illegible documentation in the literature section. This version indicated **176g CO_2/Km**.

The third document, containing the amended technical offer, was provided through a clarification initiated by the first evaluation committee. The Board is of the view that the second evaluation committee should not have taken this clarified document into account, in order to preserve impartiality.

Accordingly, the Board holds that the evaluation committee was not in a position to assert with certainty that there were "no doubts" as to whether the appellant's technical offer complied with the tender requirements.

Indeed, members of the second evaluation committee admitted under oath that they did not take the self-declaration into account. The Board also refers to the Court of Appeal's decision dated 30 July 2018 in the case of **Bonnici Bros Projects Ltd et v. Ministru Ghas-sahha et** and the decision of the 25th June 2018 in the names of **Rockcut Limited v. Id-Direttur Generali tad-Dipartiment tal-Kuntratti et** where the Court of Appeal held that:

"l-offerent m'ghandux jigi skwalifikat fuq in-nuqqas tal-ghotja ta xi taghrif mitlub fid-dokument tas-sejha, jekk kemm il-darba l-kumitat ta' evalwazjoni jkun jista jikseb dak it-tgharif min xi parti ohra tad-dokumenti li jigu sottomessi bhala parti minn dik l-offerta."

Furthermore, **Public Procurement Note 40, Section 4 – Policy Content and Guidelines** stipulate:

"In the eventuality that it transpires that ***the submitted information/documentation is*** *or appears to be ambiguous,* ***contrasting*** *[Board emphasis] or not sufficiently explicit and clear, Contracting Authorities/Entities, in their capacity as Evaluation Committees,* ***shall*** *[Board Emphasis] request the concerned Economic Operators to* ***clarify the necessary information/documentation*** *[Board Emphasis], within the appropriate Time Limit."*

In light of the above, the Board finds that the evaluation committee had before it a document (**self-declaration – requested by the tender (pg. 29))** which clearly demonstrated compliance with the emissions requirement. Thus, it was incumbent upon the committee to seek clarification rather than dismiss the offer. The Board therefore disagrees with the evaluation committee's interpretation and procedure, and upholds the appellant's argument.

d) **Re-evaluation based on evaluation**

The appellant contends that the second evaluation committee failed to comply with the directives issued by the Court of Appeal and improperly based its re-evaluation on the workings and outcomes determined by the first evaluation committee. Specifically, the appellant refers to the judgement delivered by the Court of Appeal on the 22 June 2022 in the case of **South Lease Limited v. CPSU et** where the Court stated that**:**

"Tibghat il-kaz ghal quddiem l-istess autorita sabiex, tramite persuni li ma kienu bl-ebda mod involuti fil-kaz, terga titratta u tideciedi fuq l-offerti fid-dawl ta dak li jinghad f'din is-sentenza"

The appellant argues that, in line with the Court's directive, the second evaluation committee was required to conduct an independent re-evaluation, uninfluenced by what was previously determined by the first evaluation committee.

However, both the CPSU and the DOC rebutted this argument by asserting that the conclusions reached by the second evaluation committee adhered to the prescribed procedure. The CPSU further emphasised that the clearest indication that the second evaluation committee was not influenced by the workings/findings of the first evaluation committee lies in the fact that it reached a different recommendation, that of cancelling the tender.

Upon review of the relevant documentation and testimonies, the Board finds that while the letter of rejection cited, in the opinion of the second evaluation committee, non-rectifiable issues, it included other reasons for rejection, which had been derived from the conclusions of the first evaluation committee.

Furthermore, the Board noted that even in the section entitled "Technical Offer Form", the second evaluation committee's conclusion, in contrast to what was reflected in the testimonies, was not limited to issue of rectifiability. Instead, the rejection was influenced by consideration of a clarification request that had been issued by the first clarification committee. The relevant portion of the rejection letter is reproduced below:

> *"In the Technical Offer Form section 3.2.3, the bidder stated that the AVERAGE Emissions of the Tail-lift Vans are 196 g/Km,* ***while he stated that the AVERAGE Emissions of the Tail-lift Vans are 176 g/Km when resubmitting the Technical Offer Form following a clarification request for the submission of Literature."***

Moreover, testimonies from all the evaluators confirmed that reliance was placed on documents submitted in response to the first evaluation committee's clarification request. The following excerpts from testimonies illustrates this:

- *"jiena li rajt 176 u mhux 175",*
- *"jiena x'imkien rajt wahda li kienet 196 maqtuha u imbat 176 miktuba fuqha u ahna mxejna ma dik"*
- *"pero ahna qadna fuq dik il parti l-ohra fejn kien hemm 196 imbad giet 176 li hemm ifhimni anki jekk 176 xorta gew li mhux qed jaqblu"*
- *"id-dokumenti li rajna… il-minimum li kien hemm 176",*
- *"Jiena li rajt tal-196 u maqtuha 176"*

The Board emphasises that the second evaluation committee did not issue a clarification request of its own. It is therefore evident that the committee relied on a clarification previously issued by the first evaluation committee. The Board also notes that the clarification from the first evaluation committee related solely to the illegibility of the submitted literature and not to the discrepancy between the Technical Offer Form and the Self-Declaration. Hence, The Board is, therefore, of the opinion that the DOC's reference to the judgement of the Court of Appeal dated 22 June 2022 in the case of **Nquaymt v. Infrasturcture Malta**, where the Court held that:

> *"Jekk l-oblatur ikun inghata opportunita ta rettifika imma xorta wahda jibqa administratively non-compliant, il-bord tal-evaluazzjoni ma jistax isalva dik l-offerta billi joqod jigri wara dak l-oblatur sakhemm dan forsi jirregola l-pozizzjoni tieghu"*

does not hold.

Indeed, members of the second evaluation committee admitted, under oath, that they did not take the self-declaration into account, whilst considered a clarification issued by the first evaluation committee. This undermines the principle of procedural fairness and the requirement for each evaluation committee to carry out its functions autonomously in line with self-limitation principles.

Based on the above, the Board concurs with the appellant, whereby the second evaluation committee was required to conduct an independent re-evaluation, uninfluenced by what was previously determined by the first evaluation committee. Consequently, the Board upholds the appellant's argument.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides to:

a) Uphold Appellant's contentions with respect to

   1) Preliminary argument relating to the failure of the Contracting Authority to adequately communicate the reason for the cancellation of the tender.

   2) Reason of rejection and obvious material error

   3) An evaluation which took into account workings and outcomes determined by the first evaluation committee

b) Does Not Uphold Appellant's contentions with respect to

   1) Preliminary argument relating to obligation on the Contracting Authority to inform all participants of the rejection or award of their tender.

   2) The argument that the second evaluation committee did not adhere to the Court of Appeal directive, not to penalise the appellant over whether emissions should be assessed on a "per van" or "average" basis.

c) To revoke the Letter of Rejection and Cancellation dated 11 July 2023;

d) To order the contracting authority to reintegrate and re-evaluate the bid received from South Lease Limited in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original and second Evaluation Committee, whilst also taking into consideration this Board's findings'

e) Directs that the deposit paid by the Appellant to be fully reimbursed.

Mr Kenneth Swain **Chairman**	**Dr Ing. Damien Gatt** **Member**	**Mr Keith Victor Grech** **Member**